

The Drone Debate

Sudden Bullet or Slow Boomerang?

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The Drone Debate: Sudden Bullet or Slow Boomerang?

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Introduction

Growth in the manufacture, military use, and transfer of unmanned aerial vehicles (UAVs or drones) and their associated systems proceeds apace. UAVs were initially employed on an intermittent basis for search and reconnaissance purposes, but it took the New York attacks of September 11 2001 to galvanise their production, proliferation and weaponisation. Since then the expansion of this technology has been remarkable. But so, too, has its accompanying controversy, both aspects explored in this paper which tests a claim that the drone phenomenon has become a lightning rod illuminating a range of hard legal, ethical and policy differences.

Although expansive, the current UAV discourse amongst concerned interests has revealed some conspicuous gaps. Absent are appraisals to adequately link key legal, foreign policy, security, and domestic political considerations emerging from drone proliferation.¹ A composite perspective on the drone question is needed and that is the objective of this paper. After further introduction, topic headings include utility which will embrace relevant security and foreign policy concerns; legality; accountability; ethical considerations; scope for possible controls; and summary conclusions. But to commence what are the primary contours of drone development, and why has it evoked continuing controversy?

Drone Proliferation: Substantial and Controversial

For military purposes, drone proliferation has been spurred by the advantages of mission versatility, strike accuracy, and relative economic cost. So, too, is the absence of own force casualties a major consideration. An ability to loiter for considerable periods adds to the quantum, if not quality of intelligence gathering, reconnaissance utility, and target identification functions. These weapons accelerate responsiveness: a drone fired missile can travel faster than the speed of sound, striking a target within seconds ahead of earshot. Their remotely controlled accuracy can reduce target area casualties; ostensibly a factor in the Obama Administration's enhanced use following the al-Majala cruise missile strikes in Yemen of December 2009 which killed 55 people with the assistance of cluster munitions.²

Military drones perform credibly when undertaking the so-called 'dull, dangerous and dirty' tasks, for example routine surveillance functions, operations in high ground to air threat locations, and monitoring areas suspected of contamination by unexploded ordinance or landmines. And drone use can support deterrence objectives as in covering continued troop withdrawal from combat theatres such as Afghanistan. Although their supporting personnel requirements are extensive, these systems are relatively less expensive than manned aircraft.

Already substantial, the growth and international transfer of these systems is set to continue climbing. Miniaturisation is moving ahead rapidly, including devices carried by field rucksack, having a 10 kilometre range, fired from a mortar like tube, and operating to real time hand-held control. The 2.5 kg *Switchblade*, for example, can not only identify targets, but if necessary attack them through kamikaze-type strikes. What is purchased may offer dual use potential through reconfiguration for military purposes. Expanding rapidly are sought-after non-military functions embracing police intelligence, border surveillance, crop evaluation, search and rescue, forest fire identification, disaster relief, road accident monitoring, and law enforcement. And in a sign of the times, there is now drone use by the paparazzi.

A United States General Accounting Office Report of 2012 indicated that, as of December 2011, at least 76 countries had acquired UAV technology and associated systems whether for military, civil, or possible dual use.³ A major production entity, the Teal Group, assessed global UAV expenditure at U\$6.6 billion as of 2012, a figure projected to double in the next decade.⁴ The United States' long term intentions are evident with an unmanned aircraft

systems flight plan extending to 2047.⁵ On the drawing boards is enhanced autonomy - drones capable of firing weapons based on algorithms should a human operator react too slowly, or where functions are compromised by electronic jamming.

In 2012, the US Air force was training more unmanned systems operators than fighter and bomber pilots combined. Given their relatively lower cost, UAV expansion is invigorated by scheduled cuts to defence spending. Accordingly some of this capacity is hired out, as with Australian, Canadian and German leases of Israeli made *Heron* systems. For one expert, Douglas Barrie, any moderately serious air force of the future will want at least a medium-level endurance drone equipped with reconnaissance and possibly weapons capability.⁶ Numerous countries are opting for tactical systems because they can more readily accommodate available dual use technology.⁷

The two dominant international suppliers are Israel and the United States. Israel is the biggest vendor of relevant technology, at times utilising subsidiaries in consumer markets. United States/Israeli cooperation on UAV development features within Washington's annual US\$3 billion bilateral military assistance package. (This continues despite strains such as those seen after 2003 when Israel upgraded the radar seeking *Harpy* killer drone system, containing indigenous American technology, but then sold to China. After China tested this weapon over the Taiwan Strait a year later, the Americans suspended a strategic dialogue and technological agreement with Israel. That was resumed in 2005 on an understanding permitting the US to block Israeli third party arms sales deemed inimical to American security interests.)

While parallel Chinese activity has intensified, the United States dominates relevant research and development, activity boosted by vigorous lobbying from the Association for Unmanned Aerial Systems International which includes some of the leading American aerospace companies. Since 2009 its conduit into the U.S. Congress House of Representatives has been the so-called 'drone caucus'; a companion Senate entity was established in 2012. Turkey, South Africa, Singapore, and states in Western Europe are also developing indigenous research, development, and production capacities.

As to controversy, most at public levels has arisen from claims that drone strikes have indiscriminately caused civilian casualties disproportionate to desired military objectives.⁸

Claimed accuracy of non-combatant casualties figures aside, there is no mistaking the gap between those officially declared, and the numbers derived from a variety of independent sources.⁹ Whatever the true totals, civilian casualties sustained by drone strikes within target locations have deepened local hostility against attackers and home governments alike. This limits the scope to negotiate ceasefires and weakens the public support required to secure enduring peace settlements. These obstacles are evident in Pakistan, Yemen, Afghanistan and the Israeli occupied territories. Such local hostility feeds insurgent recruitment and degrades access to reliable intelligence.

Public concern over military drone use has expanded through social media images and blandishments. Compelling are contrasts between the modesty of destroyed tribal area habitations, and the technical sophistication revealed by *Predator* or *Reaper* strike drones; between those seen operating remote location operations in Washington or Nevada, ostensibly targeting with ‘precision’, and those forlornly viewing the rubble of a destroyed family compounds; between arguments justifying drone strikes as legitimate military action in time of war, and those regarding it as assassination beyond the law. Of these, the most widely noted is that distancing killers from killed, remote operators removed from caution-inducing conditions of battle and combat.¹⁰

Regardless of position, few deny the public currency of these disjunctions. They are easily grasped and readily exploitable for an aggravation of grievances. Such divisions propitiate future polarisation by threatening to remain so, grist to the mill for insurgency networks employing terror and keen to foster international media coverage of their grievances.¹¹ The risk is real, therefore, of military drone technology acting as an insecurity multiplier – a form of political oxygen galvanising insurgency. The manifestations of such hostility may be diverse and unpredictable, but not its constancy. Without doubt, drone use hardens existing prejudices.

Viewed more positively, controversies help illuminate contrasts of value, of ends, and of rule formation and application. Over value when weighing the worth of a civilian life as against perceived military necessity; about ends when testing the exploitation of an available technical military advantage against the foreign policy goals of attaining a secure peace within a conflict location; over rule formation and its application where established international customary rules and treaties encounter idiosyncratic interpretations concerning

compliance and implementation requirements. However employed, none of this debate is distant from drone use.

Some of it sustains persisting questions of consequence: what are the limits of an open-ended 'war on terror', what is meant by 'unlawful combatancy'; of justified 'decapitation'; or 'proportionality' in the use of lethal force? At times masking unexamined assumptions, the language employed warrants persistent interrogation. Should that task prove fruitless, then questions emerge as to whose interests are served by such indeterminacy?

Utility: The Security Dimensions

Assessing the military utility of drone technology requires matching performance against intended objectives. Warranting consideration is a five year period spanning 2008 to 2013 which witnessed enhanced drone use in Pakistan, Afghanistan, Yemen and the Israeli occupied territories. At that period's outset, what were the key military objectives entailed, and to what extent had they been achieved five years later? Were net security benefits discernible, or had enhanced military use acted as an insecurity multiplier in key target locations?

Security objectives have necessarily differed according to location, but some commonalities are evident. They include the elimination of insurgency leaderships of known willingness or capacity to employ terror on a transnational basis; related aims of weakening insurgent membership, organisational and recruitment capacity; and marginalisation of these entities in the national and international politics of settings concerned.

First, what of targeted leadership elimination? Whether achieved by drone strikes or other means, observers consider its security effectiveness as immediately conclusive but subsequently mixed. Jordan considers decapitation effectual in some locations, while counterproductive against larger, older, religious and separatist organisations.¹² Johnston's investigation found decapitation contributing to counterinsurgency by reducing insurgent attacks and levels of violence but, unsurprisingly, providing no 'silver bullet'.¹³ Counterinsurgency expert Byman has viewed leadership elimination instrumental in removing charismatic figures able to unify otherwise fissiparous movements.¹⁴ Afghanistan observer Kate Clark has viewed targeted killings as potent, but only to the extent they are followed by governance functions offering tangible benefits to local populations. If not, their impact is no

better than neutral.¹⁵ Her observations extend to key locations in Pakistan where, like Afghanistan, divided loyalties, failed governance, intrusions of external force, and localised violence have been endemic.

However spectacular and immediately final, leadership eliminations are no substitute for the lengthy, often frustrating tasks of familiarisation within settings that outsiders find initially alien and incomprehensible. Doing so requires skills of language competency, and an understanding of the histories, cultures and religions of previously subjugated societies. Assumptions that these concerns have lesser importance have not arisen with drone technology alone. It is rather public and official mind-sets in Israel and the United States that deem the removal of terrorist leaderships of greater priority than remedying the grievances that they exploit.

Badly in need of such remedies have been Pakistan's troubled North and South Waziristan tribal areas immediately adjacent to Afghanistan. They have witnessed trans-border insurgent and criminal enterprises, such as the Taliban affiliated Haqqani network. This has maintained links with elements in Pakistan's army-led Inter-Services Intelligence (ISI) directorate although not as intimate as some suggest.¹⁶ Some drone leadership eliminations notwithstanding, the Haqqani network has sustained an active trans-border presence and enough capacity to kill those suspected of supplying information for use in targeting drone strikes. That depth of support was sufficient to have it designated a terrorist organisation by the United States in September 2012. In some instances, the removal of unwanted tribal and insurgent leaderships has been locally welcomed, though without preventing further intra-tribal conflict conducted in the absence of basic governing functions. This is what occurred within the Tehrik-e-Taliban after the August 2009 killing by CIA drone strike of prominent leader Baitullah Mehsud.

Perusal of leadership elimination data for Pakistan, collected by *The Long War Journal*, reveals a peak of activity between 2008 and 2011. These estimates give totals of 19 killed in 2008; 16 in 2009; 18 in 2010; 9 in 2011; and as of March 2013, two eliminations. Of that total of 64, 42 could be identified as either military commanders or closely associated with combat functions (bomb makers, suicide trainers, and shadow commanders), the remaining 22 fulfilling religious, financial, communications, and personal aide functions.¹⁷

In Yemen, a sharp rise of Al Qaeda leadership eliminations occurred in 2012 - a total of 42 compared to 10 in 2011 and four a year earlier. They included in 2011 high profile eliminations that included Abu Ali al-Harithi, a commander in the al Qaeda affiliated Aden Abyan Islamic Army, Fahd al-Qussa, Al Qaeda leader and suspect in the 2000 USS Cole bombing, and the CIA elimination of the subsequently discussed US citizen Anwar al-Awlaki.¹⁸ Evident in both Pakistan and Yemen by 2013 was the growing list of lower rung eliminations loosely categorised as ‘militants’ or ‘foreign fighters’. While dabbling in insurgency, the greatest motivation to violence by these people lies in exploiting unstable conditions for localised control of economic gain.

Second, this leads to security objectives designed to degrade insurgent group resilience and support. Again, results suggest partial effectiveness. They include precipitating constant flight from possible attack which helps to dislocate group cohesion, and to weaken opportunities to build support through forms of public assembly. Group cohesion is further disrupted by the alienation and mistrust engendered when insurgent formations kill or capture any suspected of receiving payment for supplying potential targeting information.¹⁹ However these retaliations, such as those executed by the Pakistani Khorosan Mujahedin, also reduce flows of reliable intelligence and an acquisition of potential target information gained by drone electronic intercepts. The result is a mosaic of target area information, but not one providing a comprehensive picture of drone strike impacts upon insurgent group strength. This applies in the Pakistan tribal areas, much of Afghanistan, southern Yemen, rural Somalia, but less so in the Israeli occupied territories.

This situation has created a difficulty of substance. It concerns the criteria and justification employed for elimination of lesser ranked insurgency memberships. Reliable on the ground human intelligence lacking, the barrier of targeting certainty has been lowered. This has allowed Washington to broaden its rules of engagement to embrace so-called ‘signature strikes’, and where the observed behaviours and movements of potential targets obtained by wiretaps, aerial surveillance, or local informants is deemed sufficient to permit lethal attack. This includes those generalised as ‘militants’ or ‘foreign fighters’ (Uzbeks in Pakistan and Afghanistan for example) considered distinct from known terrorist ‘personalities’, as well as other assumed associates even where their actual identity is unknown. Covering military-aged males occupying a strike zone, this nomenclature is used to justify killing individuals not deliberately targeted. Conducting ‘signature’ strikes against ‘militants’ has aroused

considerable unease, being now the Achilles heel of drone operations conducted by the Central Intelligence Agency (CIA) and Joint Special Operations Command (JSOC) in Yemen and Pakistan.

A further concern surrounds the consequences of post-strike splintering within and between insurgent organisations. Hence while the Tehrik-i-Taliban Pakistan (TTP) insurgency was weakened by drone strikes, its subsequent fracturing led to an increased recourse to criminality. Closely linked to violence and instability, this reduced the net security benefit throughout Pakistan's troubled borderlands with Afghanistan. On the ground problems are compounded by an absence of legitimised political representation; remarkably it was not until 1996 that residents in the Pakistan tribal areas gained the right to vote, women under local pressure not to do so. Political alienation is compounded by fractured economic development, vulnerability to opportunistic criminality, antiquated administration, and trans-border mobility into and out of Afghanistan. Pakistan's insecurity and poor governance interact negatively - twin dilemmas deemed of 'staggering' proportions.²⁰ Resentment against central authorities has refracted more widely, including mounting anger within the Shia community, comprising 20 per cent of Pakistan's 180 million, against a government considered either unwilling or incapable of protecting them from a rising wave of sectarian killings.

In North Waziristan, insurgent leaderships issued edicts in 2012 banning polio vaccination programmes on grounds of their use to gather intelligence and conduct drone strikes in the tribal areas. Those concerned included the frequently drone targeted Hafiz Gul Bahadar, a prominent North Waziristan Haqqani affiliate, and Mullah Nazir an influential South Waziristan Taliban leader, subsequently killed in a January 2013 drone attack. Similar obstructions have impeded civil society formations prepared to advocate non-sectarian objectives such as overdue tax and land reform, non-violent dispute settlement, and female education.

To be sure, drone strikes are not solely responsible for an absence or dislocation of authority across Pakistan and Afghanistan. But their ripple effects are evident in settings where the reach of extended families and clans is extensive, porous, and trans-territorial. Readily informed by the loss of a known relative, this provides a fertile catchment for insurgent recruitment. It builds resentment sufficient to deny higher-level cooperation with any constituted authority known to maintain security links with the United States and its allies.

While the Pakistani government has in instances publicly condemned drone attacks as illegal violations of its sovereignty, in others it has acquiesced or supplied information used for elimination of the insurgent leaderships to which it is opposed. Suspicions have been confirmed that ruling military or political leaders have supported selective drone strikes against tribal leaderships inimical to their interests.²¹

Rapid urbanisation, youthful demographics, poverty and unemployment also offer fertile grounds for the propagation of insecurity in Pakistan. Radiating outwards, protracted factionalism in the tribal areas degrades economic conditions and heightens incentives to gain control of the criminal financing rife throughout Pakistan's major cities. This involves larceny, kidnapping, extortion, and smuggling. Karachi is considered an attractive hideout for Al Qaeda and Taliban groups avoiding drone strikes, and where its size and assortment of ethnic and linguistic groups facilitate clandestine operations that include attacks on the established political parties. Perpetrators include anti-Shia formations such as the Haqqani-linked Lashkar-e-Jhangvi network which supported the Defence of Pakistan Council that, ostensibly in retaliation against drone strikes, pressured the government in 2010 not to reopen NATO primary supply routes out of Pakistan. A local scholar, Hussain Nadim, has asserted that 'drones will be useless if security forces are unable to stop a migration of militants into urban centres.'²²

In Yemen, the tempo of drone strikes quickened after May 2011 when Al Qaeda and its broader-based political affiliate, Ansar al-Sharia, gained control of a substantial segment of the Yemeni south.²³ This risked further embroiling Washington within an essentially civil conflict, further complicated by sectarian violence in the north of the country.²⁴ Tactics of the now deposed Saleh leadership persist, including adept utilisation of the American fixation with terrorism and Al Qaeda in the Arabian Peninsula (AQAP) to get financial assistance then abused to buy off the regime's supporting tribal sheiks. The greater is American determination to eliminate known AQAP elites, the less attention devoted to the country's glaring economic, governance, employment and social needs. These afflictions persist, notwithstanding improved resourcing of their needs following open letter demands to the US government by Middle East experts, including former American Ambassador to the Yemen Barbara Bodine.²⁵ In some Washington policy quarters awareness is growing that economic distress, not resentment over drone strikes is the primary driver of insurgency.

Disputes over whether US drone strikes in Yemen provide fertile recruiting ground for the AQAP are secondary to a bigger question.²⁶ This simply asks what they are attempting to achieve into the longer term. For American Yemeni expert, Greg Johnsen, the United States does not have a Yemeni policy so much as a counter-terrorism strategy operating in that country.²⁷ The dilemma persists of a Yemeni regime unable to remedy the long standing historical and tribal divisions feeding the growth of AQAP influence. An undue reliance upon drone strikes to reduce that influence is harming the regime's credibility amongst its local populace.

In other target settings, an accurate picture of drone strike impacts upon insurgent leaderships and their organisations remains incomplete. The extent and impact of Israel's employment of drones is not public, including use in Somalia. However some documentation of their civilian casualty toll has been published.²⁸ Nor are indications forthcoming about whether drone secured intelligence, acquired by NATO members, is weakening the insurgencies that are fomenting conflict in Mali. By contrast most drone strikes in Afghanistan have been up front military operations, determined by local commanders and subject to review by military lawyers. Conducted largely in support of ground troop operations they increased sharply in 2012 compared to a year earlier.²⁹ Manned air attacks resulting in unacceptable civilian casualties have aroused greater hostility from the Karzai government. Like Israel, it has been willing to utilise drone use for target identification.

The United Nations Assistance Mission to Afghanistan, utilising US data, reported drone strikes had increased from 294 in 2011, to 506 in 2012. This resulted in 16 civilian deaths in the latter year.³⁰ That was seriously overshadowed by the estimated 2179 civilian deaths (81 per cent of the total) sustained at the hands of anti-government forces, many caused by improvised explosive devices.³¹ Given this conflict's propaganda war the statistic is revealing, aggravated by an event witnessed in February 2010, when 23 local nationals were killed by a drone-directed US helicopter air strike.³² The relatively lower number of casualties inflicted by drone strikes is damaging because, unlike this conflict's amorphous anti-regime forces, it carries an identifiable source of blame. Drones thus sustain high profile killings, while those resulting from improvised explosive devices are locally mourned but collectively relegated to the debris of war. Afghanistan has no local Bureau of Investigative Journalism actively publicising the indiscriminate killing conducted by its conflicting factions.

In sum, much of the debate regarding the security effectiveness of a now decade long military drone campaign is unresolved. Without such evaluation a situation could prevail where, for Kilcullen and Exum, ‘the use of drones displays every characteristic of a tactic – or, more accurately, a piece of technology – substituting for a strategy’.³³ This indicates a front-end deficiency, prior evaluation lacking about how to accurately assess the impact of drone strikes in reducing insurgency and insecurity. This is pertinent where counter-terror operations, aimed at targeting known insurgent leaderships, sit awkwardly within a strategy of counter-insurgency designed to wean populations away from such leaderships. It is even more apposite where counter-insurgency is failing by supporting governments so weak as to crumble without massive external assistance.³⁴

Leadership eliminations have been sustained to immediate effect but permitted successors to continue exploiting local grievances by means of propaganda and insertion into international security agendas. Insurgencies have been hobbled in some locations, but refracted and regrouped elsewhere within unstable settings. Try as they might, drone strike strategies cannot avoid their contribution to a kaleidoscopic destabilisation of the settings within which they occur. Seemingly quick eliminations are revealed as no substitute for slow and tedious policy measures delivering enhanced security.

Utility: The Foreign Policy Dimensions

This investigation of drone utility has assessed two components: leadership elimination impacts, and intended damage to insurgent group cohesion. Both have achieved some desired results; both have raised doubts about their contribution to longer-run strategic objectives. The hard questions they raise are further complicated when a third, foreign relations dimension enters the frame. Initially at least, a broadly similar pattern appears to apply. A weakening of external capacity by non-state insurgencies is followed by dispersal, splintering, and opportunistic exploitation of disorder. There comes a readiness to serve other state-based foreign relations interests as perceived advantages emerge. Hence the Pakistani-based Taliban have fomented disorder in Afghanistan as suits Islamabad’s concerns over growing Indian influence in that country following allied forces withdrawals.

What might seem an obvious and immediate need - the removal of a known insurgent leadership - proves ineffectual once targeted groups begin stoking insurgent strategies instrumental to key goals such as an entrenchment of Sharia law. This is playing away as it were, into Iraq or Syria for example or, more distant, Mali and Nigeria. Seemingly decisive blows of leadership elimination shatter unpredictably throughout a variety of audiences among unstable environments. Jordan security expert Abu-Roman puts it simply: where there is state chaos and collapse, Al Qaeda will be active.³⁵ From another perspective there is confirmation of Emile Simpson's important thesis: the outcome of much conflict is now guided less by body counts, than about how different outsiders 'read' what they want to from such conflicts and respond accordingly.³⁶

The foreign policy implications of drone proliferation extend beyond immediate target area insurgency locations. In the fraught politics of the Sino/Japanese maritime standoff over the Senkaku islands, China has signalled planned drone surveillance of the disputed area by 2015.³⁷ Doing so will not allay tensions with the United States as China ramps up production of a *Predator* copy curiously named the *Pterodactyl*. Future American drone sales to Japan stand to further complicate Tokyo's testy relations with China. Unsettling as well are signs of drone strike competition emerging between North and South Korea, both developing so-called 'kamikaze' drones, and between India and Pakistan.

In Europe, bilateral disputes over the terms of national involvement in co-production arrangements represent quieter, but real difficulties for NATO. Relations in the Middle East are rendered difficult by Israel's use of neighbouring Jordan's airspace for drone intelligence over flight purposes. Elsewhere in the region, Iran and Turkey have resented Israel's US\$1.6 billion arms deal with Azerbaijan that included drones, anti-aircraft and missile capabilities. Concluded in February 2012, this agreement complemented existing political and economic cooperation between Israel and the Aliyev regime. Like other arms transfers, the coinage of drone transfers in the possible service of foreign policy objectives can prove double-sided.

Domestically governments are sensitive to public disquiet over drone strikes, and the concerns of analysts and policy practitioners apprehensive about precedents set by targeted killings.³⁸ Further apprehensions exist over the future shape of a seemingly open-ended global war on terror, strains within important bilateral relationships, and public pressures on governments anxious to maintain good relations with the United States. All have increased with the intensification of drone warfare as a combat response to terrorism. Although

America's global war on terror has modified in rhetoric since September 11 2001, key policy designations shaped by that event have remained essentially intact. While Washington's unilateralist proclivities may have diminished, this possibility harbours foreign relations difficulties for any American administration seeking international support for its anti-insurgency campaigns. In some capitals, eyebrows have been raised over President Obama's direct involvement in drone target selection, possibly his means of ensuring enhanced collaboration between the CIA and the Pentagon. That continuous level of engagement is unusual, rendering such high office vulnerable to critical external scrutiny in the event of serious operational miscalculation. Meanwhile, interested outsiders stay tuned to the selectively leaked exposure of Washington's inter-agency drone policy contests.³⁹

Although of disputed impact, retaliatory or so-called 'blow back' responses resulting from drone strikes also raise concern among governments. The casualties entailed may be tenuous but cannot go discounted.⁴⁰ Somewhat opportunistically, Pakistan Foreign Minister Qureshi claimed in May 2010 that an abortive New York Times Square bombing was a blow back retaliation from US drone strikes targeting Taliban followers along the Pakistan/Afghan border.⁴¹ It is a valid question whether a 'blow back' response would be any less had a strike been mounted by fighter ground attack off an aircraft carrier. Of deeper policy relevance, however, are the more diffuse causal linkages. Hence when describing 'how the proliferation of this technology will mark a major shift in the way wars are waged' US Arms Control Association Director Kimball has warned 'we need to be very careful about who gets the technology. It could come back to hurt us.'⁴² Indeed John Brennan acknowledged as much, saying that the US is 'establishing precedent that other nations may follow'.⁴³

The drone strike strategy has exposed critical nerves in a range of bilateral relationships, most evidently between Pakistan and the United States - 'at every juncture' according to a Pakistani Ambassador to the US, Sherry Rehman.⁴⁴ The US would argue that its drone attacks are justified as acts of collective self-defence for its ally Afghanistan, defence of that country's sovereignty part of an on-going armed conflict with well-organized armed groups operating beyond its borders. A Pakistani view, contrary to American demands, would maintain that its longer term interests following the scheduled withdrawal of foreign forces from Afghanistan are not served by attacking militant affiliations, including the Afghani Taliban or the feared Haqqani network. In some form or another, goes Pakistani reasoning,

these entities will require some form of selective political accommodation which is not to deny their continuing capacity for destabilisation.

More obliquely Pakistan's leaders, when claiming their country's domestic radicalisation into extreme violence is attributable to drone strikes, use this to bargain over cooperation with Washington, the return being higher levels of economic assistance. A running sore in the relationship is the fact that much of the resource provided by Washington for security purposes through Coalition Support Funds, is unaudited, whether through lack of transparency in the army, waste, corruption or mismanagement.⁴⁵

The country's national security is compromised by an unhealthy coexistence where Pakistan's secret agreements of selective cooperation with the United States are left open to public denial by either side. This concerns other governments, uneasy about having host state consent to drone strikes based on the shifting atmospherics of 'wink and nudge' signals conveying selective approval. For them, and rightly so, this smacks of making up the rules while travelling along. In the interests of unambiguous sovereignty, they have argued, host state consent has either been granted or it has not.

Here Pakistan cannot avoid the responsibility to utilise formal means of protest over sovereignty violations or recourse to possible international remedies.⁴⁶ Like other drone target entities, it has obligations to respect and protect the human rights of its citizens or other nationals within its territory under a general prohibition of extrajudicial killing under international law. Some see the 'fervent anti-Americanism' evident in Pakistan best reduced by increased accountability of its government for civilian casualties and where, in the tribal areas, compensation has been lacking following seriously misdirected strikes.⁴⁷

The trust gap dividing the United States and Pakistan will need to narrow for any peace settlement to endure in Afghanistan. A lack of transparency surrounding covert CIA and JSOC drone operations within Pakistan, whatever its security justifications, limits prospects for stable foreign policy cooperation between Washington and Islamabad. As important is resolution of a key difference identified: when, and on what terms will a negotiation occur with groups holding enough power to indefinitely prolong an ever damaging stalemate?

When contrasting remotely controlled strikes with conventional military operations, former White House adviser Brennan maintained that ‘large intrusive military deployments risk playing into Al Qaeda’s strategy of trying to draw us into long costly wars that drain us financially, inflame anti-American sentiment and inspire the next generation of terrorists.’⁴⁸ Unexamined, was the possibility that remotely conducted drone strikes risk similar consequences, including hostility to unrelated forms of western intervention including humanitarian assistance.⁴⁹

The line demarcating targeting killings from assassinations is another fine one whose breach incurs reputational damage. Governments cooperating with the United States are exercised over the negative domestic publicity emanating from what former Director of National Intelligence, Dennis Blair, has characterised as an intense focus on drone strikes. Or more bluntly by former CIA Director Leon Panetta as ‘the only game in town’ for disrupting Al Qaeda leadership.⁵⁰ The disquiet identified extends to intelligence cooperation, worries evident among British and European officials over possible legal liability emanating from connection to an American drone campaign considered not just unpopular but illegal in their home jurisdictions.

Retaining relevance is a 2008 Rand investigation about why terrorist groups cease their activities. Evaluating 268 groups between 1968 and 2006, it found 43 per cent went out of business following a political settlement with a host government; 40 per cent as a result of effective policing and intelligence penetration; 10 per cent after they had achieved some form of military victory; but only seven per cent through subjugation by military force.⁵¹ Even if no more than partly correct, these figures do not comfort governments looking to build relationships in the decade ahead with states currently sustaining drone strikes. Interests include security of energy supplies, lessened sectarian tensions, reduction of illicit arms flows, and support for multilateral processes fostering trade, development and human security.

The Legal Debate

At times arcane, the legal debate over drone strikes has been intense; it has also been necessary. Key differences include the actual boundaries of ‘self-defence’, ‘imminence’ of perceived threat as justification for anticipatory military action, and the relative writ of International Humanitarian Law (IHL) and International Human Rights Law (IHRL) in

conflicts both internal and international. The importance of these rules notwithstanding, a healthy regard to the limits of the law over contentious political and foreign policy issues is nevertheless warranted. And what is legal may not always be wise.

IHL comprises a body of rules designed to limit the effects of armed conflict by protecting those who are not combatants, or who have ceased to perform those functions. Nobody is beyond the reach of these rules. These provisions interrelate: first, the civilian/military distinction which is central to IHL offers protections to civilians so long as they are not making a direct contribution to military operations. Second, is the proportionate use of force. While *in situ* judgements will shape proportionality determinations, the bottom line insists that it is unlawful to destroy people or objects unless that is demanded by military necessity. This relates, thirdly, to the rule of precaution: a requirement to take all feasible measures in the means and methods of attack so as to avoid, or at the least minimise incidental loss of civilian life, injury to civilians and damage to civilian objects, including religious and cultural sites.

This body of law embraces customary rules, treaty prohibitions against particular forms of weaponry and, threaded through the four seminal, universally subscribed to Geneva Conventions of 1949, a common article applicable in all forms of conflict, internal or international. This includes prohibitions against violence to life and person, including murder, torture and inhumane treatment; against hostage taking and outrages upon person dignity; against summary justice and extra-legal execution conducted outside regularly constituted courts, offering the judicial guarantees recognised as indispensable by civilised peoples.

International Human Rights Law (IHRL) is a set of international rules established by treaty or custom affording people, by nature of their common humanity, a range of protections including those prohibiting arbitrary deprivation of life and liberty. The main treaty sources include twin International Covenants on Civil and Political Rights, and Economic, Social and Cultural Rights (1966); Conventions outlawing genocide (1948), racial discrimination (1965), torture (1984), and protections of the rights of the Child (1989). More recent treaties such as the Rome Statute (1998) establishing the International Criminal Court include provisions drawn from both IHL and IHRL. Of further relevance to the use of force are United Nations human rights mechanisms performing monitoring and standard setting functions outside the treaty sphere.

Clarity obtains to the extent that, for situations not involving a conduct of hostilities, human rights law assumes prior application. Here the grounds for use of lethal force are reasonably consistent: IHRL requires states use force as a last resort to protect against immediate and specific threats of death or serious physical injury. Furthermore, it requires that an opportunity to surrender is offered prior to an employment of lethal force, something drones obviously cannot provide. In instances of extreme national emergency, IHRL protections may be waived but not indefinitely. Under the International Convention on Civil and Political Rights (Article 4:2) such derogations cannot permit the arbitrary taking of human life.

Against this background why have drone strikes provoked legal controversy? First, they have inflamed debate as to not just conduct in conflict (*in bello* considerations), but initial resort to force in the first instance (the *ad bellum* factor). The latter has evolved to guide conduct between states, although its invocation has struck difficulties once the use of force is employed against non-state actors such as Al Qaeda acting in ways not attributable to any particular state. Pertinent to drone strikes is whether invocation of *ad bellum* rules permits states to unilaterally take forcible measures against non-state actors. Dusted down for consideration, though no more than partly followed, remains Webster's still pertinent 1837 *Caroline* case test justifying anticipatory pre-emptive action across borders and comprising necessity, proportionality, and imminence of attack.⁵² Obviously some threshold acknowledging proportionality is required, but when countering non-state actors its means of legal identification and substantiation remain unsettled and contentious.

A second dispute has arisen over whether interpretations of 'the battlefield' as operational construct, have widened to the extent that they trump IHRL provisions. In this instance, targeted killing by drones is justified on grounds of so-called 'imminence of threat', and impracticality of dealing with it by conventional law enforcement methods. However the attempted justifications of drone strikes in this manner unsettles the extra-territorial applicability of human rights treaties, the limits of 'emergency' criteria employed to justify a derogation of human rights obligations, or the conditions under which human rights norms bow to the prior, so-called *lex specialis* application of humanitarian law.⁵³ These concerns pre-date the arrival of drone strikes but, to reiterate, have been intensified by them.

Accordingly observers note an uneasy no-man's land between IHRL and IHL rules and principles exposed by targeted drone strikes. Radsan and Murphy see controversy over targeted killing stemming from its lack of fit with either IHRL or IHL.⁵⁴ Schmitt identifies uncertainty in the extra-territorial application of human rights rules, and whether transnational terrorism, lacking specific connection to an on-going conflict, does in fact constitute an 'armed conflict'.⁵⁵ Within the United States, the anti-terror campaign has sustained sufficient political momentum to allow its office-holders the leeway to claim that they remain engaged in an international conflict, thus justifying subordination of IHRL to the law of armed conflict.

Unanswered is the question about why the IHRL route was not taken in Yemen? This goes beyond American lack of confidence in the Yemeni government's willingness, or capacity, to conduct the policing and local surveillance needed to apprehend and prosecute known local insurgent leaderships. If relevant human rights law is not applicable extraterritorially, and should both the United States and Yemen smudge accountability or responsibility for drone strikes, then a legal lacuna of some magnitude is soon apparent.⁵⁶ The Yemen example further highlights the need for a clear demarcation between insurgency facing the sanctions of criminal law, and use of force authorised under the UN Charter.

However this leads to a third area of contention concerning the limits of UN Charter Article 51 provisions regarding use of lethal force in self-defence. Bethlehem has noted a 'normative drift' towards 'self-defence' as it becomes a general purpose catch-all used to justify much contemporary military activity.⁵⁷ That includes not only conditions used to justify Article 51 invocation, but the scale and timing of 'self-defence' responses. Doubts exist about its indefinite employment in response to discontinuous attacks, including failure to implement Article 51 requirements for immediate reporting to the UN Security Council.⁵⁸

Drone strikes have further challenged any emerging consensus as to what constitutes an overt conduct of hostilities. This has developed from the definition given by the International Criminal Tribunal for former Yugoslavia (ICTY) Appeals Chamber in its *Tadić* Decision on Jurisdiction which, in turn, helped shape Article 8(2)(f) of the *Rome Statute*. The ICTY ruling held that an armed conflict exists whenever there is resort to armed force between states or protracted armed violence between governmental authorities and organised armed groups, or between such groups within a state.⁵⁹ The *Rome Statute* article identified requires no

territorial control by an insurgent group, an armed conflict existing between two armed groups without territorial control, but providing that certain organisational and conflict intensity thresholds are met. Accordingly this refers to ‘armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups’.

Unsettled as well are demarcations distinguishing terrorism from criminality, the nature of direct participation in hostilities, primary state responsibility for military action in disputed borderlands, and the twilight status of those deemed neither civilians nor combatants but ‘militants’. (Here the news media has been criticised for its failure to more rigorously probe what is meant by such twilight status.)⁶⁰ Public controversy over UAV proliferation is further fuelled by concerns that it heralds an inception of increasingly automated weapons systems, incapable of making the distinction and proportionality humanitarian law judgements required prior to military use. Accordingly the military use of drones is attracting but not resolving contested human rights and humanitarian law treaty obligation requirements. It is another example of the drone lightning rod function previously identified.

Where, then, does this leave us from a legal perspective? Some help has come from particular rulings. For example the Israeli Supreme Court determined in its 2006 *Targeted Killings* case that such actions could not be determined by customary international law prohibitions, being subject to situational determinations. The Court nevertheless stipulated a requirement for well based, convincing evidence of an individual’s terrorist activities, the killing of civilians taking a direct part in hostilities prohibited where arrest and prosecution were employable. Post-attack investigation required thorough and independent evaluation of target accuracy, every effort made to minimise harm to civilians. Arrest and trial was considered ‘practical under the conditions for belligerent occupation, in which the army controls the area in which the operation takes place, and in which arrest, investigation and trial are at times realizable possibilities.’⁶¹

The ruling thus identified some concurrence of IHL and IHRL principles. While the court rejected the notion of ‘unlawful combatancy’, the word ‘area’ was construed expansively to include that beyond state boundaries. This avoided the question of whether Palestinians are protected persons in territories effectively controlled by Israel, that conflict deemed an international one. In the event, these findings did not materially alter Israeli military drone

strike policy prior to, and since Operation *Cast Lead* within Gaza during December 2009 and January 2010.⁶² (Strikes conducted in Gaza after 2006 had previously widened in use, at times harnessed with dense inert metal explosive weapons. By 2009 Israel had also conducted drone strikes into Sudan, action designed to disrupt the flow of Iranian sourced weaponry into the Gaza Strip.)⁶³

In April 2009, the Israeli military released results of an internal investigation which concluded that its forces ‘operated in accordance with international law’ during Operation *Cast Lead* and that ‘a very small number of unavoidable incidents’ occurred owing to ‘intelligence or operational errors’.⁶⁴ Israel’s refusal to cooperate with the subsequent Goldstone enquiry meant the number of Gazans killed went undisclosed, or how many of them could be considered combatants.

Overall it has not been hard to assemble an official rationale claiming that, yes, some drone strikes have occurred on grounds of questionable legal and institutional responsibility, and that yes, civilian casualties have unfortunately resulted, but at least these responses are preventing further terrorist outrages while shielding orderly force withdrawals from associated theatres of conflict. Moreover the casualty count, it is argued, is no worse and may well be less than that caused by air strikes (as in Kosovo 1999), cruise missile attacks, tank fire and artillery use. That said drone strike use faces the inevitable, unavoidable policy question confronting any form of military intervention about what is meant to follow in its wake.

The Brennan Defence

In response to concerns immediately outlined, an active defence of the Obama Administration’s drone policy was mounted in April 2012. The then White House homeland security adviser, John Brennan, in a widely noted statement flatly claimed that nothing in international law prevented such strikes. Since September 11 2001, he maintained, the United States had been engaged in an international conflict with Al Qaeda and its associates, all legitimate targets remaining within an ‘active’ or ‘hot’ battlefield.⁶⁵ The targeting and killing of terrorists beyond such a battlefield was done as a last resort when capture was not possible. Pilots controlling drones, he claimed, had ‘unprecedented ability’ to minimise collateral damage. The drone campaign would continue ‘at least when the country involved consents or is unable or unwilling to take action against the threat.’⁶⁶

Domestic United States concerns over the approach articulated by Brennan had sharpened following the extra-judicial killings of three of its citizens in Yemen in 2011. They included the previously mentioned Anwar al-Awlaki, suspected of conspiring to commit international terrorist acts, his 16-year old son Abdulrahman al-Awlaki, and Samir Kihan, a known jihadist. The drone strikes involved were launched from a then secret base in Saudi Arabia, a facility established under the direction of former CIA Saudi station chief, the same John Brennan. Civil liberties interests claimed such killings violated US Fifth Amendment constitutionally guaranteed rights afforded any persons (not just US citizens) not to be deprived of life without due process of law and, as well, obligations under the International Convention on Civil and Political Rights which the United States has ratified.⁶⁷

Dispute continued about the standards utilised when deciding to employ lethal force against a US citizen in a foreign country, and as identified by US Attorney General Holder in a March 2012 statement. This cited the necessity for military action against an imminent threat of violent attack against the United States; non-feasibility of capture; and operations conducted in a manner consistent with applicable IHL principles of distinction and proportionality.⁶⁸ This position was backed by an earlier, initially undisclosed US Department of Justice Memorandum of 2010. Determining the nature of ‘imminence’ subsequently featured during the publicised 2013 US Senate confirmation hearings for President Obama’s nominated Head of the CIA, John Brennan.

Those hearings coincided with the release of a US Department of Justice ‘White Paper’ asserting that an ‘informed, high-level’ official may determine that a targeted American ‘recently’ involved in ‘activities’ posing a ‘threat of violent attack’ is deemed sufficient to pose an ‘imminent’ threat.⁶⁹ Not a formal judicial opinion, this memo expanded on the approach adopted by the immediately previous Bush Administration, enunciated by its senior official John Yoo claiming that the courts have no role in ruling on how the Executive chooses to use force. Not surprisingly concerns arose over whether such discretion should solidify as a new norm asserting a right to strike pre-emptively against anyone suspected of planning attacks.⁷⁰

In the instances cited – Yemen, Israel, Pakistan and Afghanistan – fealty to IHL essentials stands to deliver practical results for all parties in conflict. Violations of these rules, whether

by drones strikes or improvised explosive devices, risks a degrading of the legitimacy of sought objectives. Such violations weaken possibilities for needed cooperation between states in fostering national criminalisation of terrorism, including the activities of its financiers. Here numerous models and templates exist, notwithstanding some rights provision inadequacies.⁷¹

Accountability

Contending positions have also been struck over due process and accountability, over resort to force, and over the proportionality and distinction rules of IHL. Here, comprehensive and objective public verification of all military drone activity is incomplete due to a lack of independent international monitoring able to reliably assess the legality, civilian impact and incidence of strikes. As well, some national security interests resist disclosure, fearing it will restrict operational choice about who is killed, when, and where. In response to inadequate disclosure, the United Nations established an investigation unit in October 2012 to inquire into individual drone attacks, and other forms of targeted killing conducted in counter-terrorism operations.⁷²

Deficiencies of public accountability by governments employing lethal force leave them unable to discharge their international human rights and humanitarian law obligations. This compromises international humanitarian, human rights, and criminal law demarcations of function and responsibility. Failure to publicly disclose procedures for enforcing compliance with applicable law makes it impossible to determine whether a government is compliant. For Kramer: ‘Making public the procedures for target selection may be the most effective means to confront human rights challenges to targeted killing. In particular, if the US wants to keep the higher moral ground, it should afford the public the process of clear, systematic target selection procedures to minimise the risk of targeting an unlawful target (i.e. a civilian), and thereby invoking guilt for a war crime under the *Rome Statute*.’⁷³

Motivations for secrecy aside, it is evident that, in Spoerri’s words, ‘lack of objective knowledge constitutes a great impediment for the assessment of the lawfulness of weapons or their use in particular circumstances.’⁷⁴ Such a lack creates analytical difficulties, although an absence good faith treaty implementation reporting may, of itself, constitute a form of negative evidence. However some clarification is possible when discerning how relevant

human rights and due process considerations have applied within activities constituting this form of armed conflict.

Retaining its significance in the United States is the 2001 Authorisation for the Use of Military Force (AUMF) legislation.⁷⁵ Sweeping and open-ended, and endorsed by Congress with virtual unanimity, this authorised the President to ‘use all necessary and appropriate force’ in pursuit of those responsible for terrorist attacks. Following Israeli precedent, the Bush Administration utilised the AUMF to employ lethal force in ‘anticipatory’ self-defence, construed terrorism an act of war not a crime, enshrined the dubious status of ‘unlawful enemy combatant’, and compromised the due process entitlements available under military commission procedures.

In February 2012, Department of Defence General Counsel Johnson reaffirmed the bedrock centrality of the AUMF for the military’s national legal authority. This included a prerogative to kill targets ‘with a geographical limitation’ including ‘belligerents who happen to be US citizens’ as well as ‘associated forces’ considered co-belligerents with Al Qaeda. Left unclear was whether ‘associated forces’ included those who may have subsequently joined Al Qaeda beyond the original September 2001 involvement stipulated under the AUMF.⁷⁶ That obscurity leaves open an indefinite prolongation of drone strikes, against a potentially widening circle of targets no matter how tenuous their links to the execution or planning of the September 2001 attacks. Concerns have been voiced that AUMF standards employed to detain individuals are also extended to lethal targeting, including liability for criminal prosecution, financing an organisation, or performing propaganda functions.⁷⁷

The wide-ranging authority conferred by the AUMF was utilised in 2009 for designation of ‘overseas contingency operations’ this a more anodyne, less provocative characterisation of the war on terror.⁷⁸ Regardless of any modification since the 2011 operation that killed Osama bin Laden, the momentum demonising terror against the United States and its allies has persisted. Its carry has helped curb public scrutiny of drone warfare conduct that, prior to September 11 2001, would have been more searching - in particular, acts of extra-judicial killing abroad.

Here a major shift has occurred from a decade earlier when Washington denounced Israel’s use of targeted killing against Palestinian terrorist suspects. In that event, American

Ambassador to Israel, Martin Indyk, asserted that: ‘The United States government is very clearly on record as against targeted assassinations ... They are extrajudicial killings, and we do not support that.’⁷⁹ That mirrored former President Reagan’s Executive Order 12333 reaffirming a general prohibition that: ‘no person employed or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination.’

If maintained, the executive discretion now entailed in targeted killing constitutes a precedent of substantial constitutional and operational significance for the United States and its allies. For Jack Goldsmith, former head of the US Justice Department’s Legal Counsel, such a precedent ‘implies that the president can wage war with drones and all manner of offshore missiles without having to bother with the War Powers Resolution’s time limits.’⁸⁰ That view was not unanimously supported with divisions evident among President Obama’s legal advisers over whether American engagement in Libya constituted ‘hostilities’ of a nature sufficient to require invocation of the War Powers Resolution.⁸¹

Even more pointed criticism of defective operational accountability came from former UN rapporteur on extrajudicial, summary or arbitrary executions Philip Alston. In a lengthy 2011 contribution, he claimed that CIA conduct of drone strikes lacked credible transparency or accountability, neglect or intentional disregard of existing executive control mechanisms, and deficient congressional and judicial oversight. The unprivileged status of CIA operatives conducting drone strikes, moreover, undermined international legal distinctions demarcating civilian and military personnel. Not fully trained in IHL, they were considered by this commentary unlikely to take account of the proportionality and distinction constraints required under its rules when conducting drone strikes.⁸²

Similar shortcomings apply to drone operations conducted by the United States JSOC. Not surprisingly voices have been increasingly raised for the US military to relieve the CIA of its drone strike operations in Pakistan, ‘more a legacy of its long-time dominance [in] targeting al Qaeda than a reflection of any special expertise in drone warfare.’⁸³ Here a disconnect has emerged between the standard-rations professional military, trained in the law of armed conflict, and the more generously resourced special forces operations less heedful of these rules. Perceived inconsistencies are also contagious, evidence of violated distinction encouraging insurgents to launch attacks from protected civilian sites, engage in the perfidious use of religious clothing, and employ human shields.

Lack of transparency further weakens incentives to accurately assess civilian losses, whether by an attacking state or by one that is targeted. Failure to do so weakens victim identification procedures required for compensation for non-combatant death or injury.⁸⁴ Under conditions not improved, Pakistan in 2010 saw ‘none of the warring parties - the US government, Pakistani government and military forces, and militants - (with) a standard policy or procedure for investigating allegations of civilian harm, apologising for mistakes or collateral damage, or providing immediate assistance to families suffering losses.’⁸⁵ The Pakistani government has some mechanisms to recognize and compensate civilian victims of conflict for their losses, but faces serious charges of failed IHL compliance.⁸⁶

International humanitarian field staffs operating in conflict locations, including Somalia and the Khyber Agency of Pakistan, maintain that drone strikes have compromised their neutrality among increasingly suspicious local populations.⁸⁷ Humanitarian field operations in Afghanistan using GPS coordinates, for example, encounter lack of cooperation from local residents when attempting to access the information they require for their assistance functions.

Beyond operations and reverting to higher levels, a US Congressional Research Service report of 2011 revealed limited comprehension about the extent to which the executive has complied with relevant legal provisions.⁸⁸ Here Washington’s inter-agency differences over drone strike policy have not assisted development of coherent executive accountability.⁸⁹ This has been compounded by a refusal by the United States to clarify how or where it draws the line between civilians and combatants, on what basis, or standards of proof followed when doing so. Possibly convenient for immediate operational flexibility, such *a la carte* selectivity of international rules determined by immediate military need and circumstances harbours longer term foreign relations difficulties.

Those defending US drone strikes believe due process requirements need to balance ‘national security against the risk of killing persons who are not lawful targets in an armed conflict or under lawful self-defence.’⁹⁰ However a ‘combination of high levels of secrecy, combined with poor accountability, make it impossible to verify the extent to which applicable international standards are respected in practice.’⁹¹ Although increasingly restive, civil liberties interests gain limited coverage in the mainstream American discourse. A neither

confirm nor deny policy by the CIA and JSOC regarding drone strike operations has handicapped freedom of information inquiries about suspected rights violations. The JSOC is not required by law to brief Congress on its clandestine operations.

These are problems that District Court Judge Colleen McMahon encountered, in January 2013, when ruling on a freedom of information case taken by the American Civil Liberties Union and the *New York Times* against the US Department of Justice. The plaintiffs sought release of a memorandum purporting to give legal justification for the previously mentioned killing in Yemen of US citizen, Anwar al-Awlaki. The Judge complained she found herself in ‘a veritable Catch 22’ unable to find a way ‘around the thicket of laws and precedents that effectively allow the Executive Branch of our Government to proclaim as perfectly lawful certain actions that seem on their face incompatible with our Constitution and laws, while keeping the reason for its conclusion a secret.’⁹²

Inadvertently perhaps, drone strikes have revived longer running concerns about the constitutionality of executive conduct in American foreign relations. Beyond its borders, and whether for immediate national self-defence or within an on-going campaign against ‘terrorism’, techniques used to ‘adapt’ international law so as to convenience targeted killing is gaining an assiduous readership in a variety of capitals. In Israel the courts have asserted requirements of intra-executive accountability by independent review for targeted killings, some incurred through drone strikes.⁹³ However they have also acknowledged the limited role of formal judicial processes, and recognised that civilian engagement in hostilities includes planning and preparation as well as active participation.

Ethical Considerations

Combat operations of any magnitude require a persuasive ethical foundation to sustain public support. That requires convincing claims about the necessity of the ends being sought and their means of achievement. While it may not always apply, more often than not the war fighting society adhering to ethical norms of public and professional accountability is the most likely to prevail. With some exasperation, a retired US infantry commander of over three decade’s experience, Paul Eaton, has insisted that ‘people are hung up on the word “drone”. The real issue is: Who are you killing and what is the legal justification for doing that?’⁹⁴ His comment pinpoints ambivalence in western democracies: acceptance that

technological military advances may reduce casualties resides uneasily over the targeted killing of individuals.⁹⁵

Public attitudes regarding the ethics of drone strikes matter. They affect the milieu within which relevant foreign relations are conducted, and political outcomes influenced by drone activity. Key concerns include an unacceptable level of civilian casualties, and lack of trust towards official explanations derived from opaque accountability. Negative reaction to drone strikes by Western publics not normally hostile to the United States has intensified. Historically that derives from a now lengthening narrative originating with protest over the indiscriminate use of air power during the Vietnam War, resentment over fabricated evidence used to justify war against Iraq in 2003 and, more recently, public mobilisation against land mines and cluster munitions.

A mid-2012 Pew Centre investigation released research findings that found substantial opposition to drone strikes among American allies. While 62 per cent of Americans sampled supported drone strikes, they were opposed by 59 per cent of German; 63 per cent French; 76 per cent Spanish; 75 per cent Japanese; and 81 per cent Turkish opinion samples.⁹⁶ More distinctive was the gender divide on the issue. Those approving U.S. drone strikes comprised 54 per cent male, but only 24 per cent female in Germany; corresponding figures comprising 57 per cent and 30 per cent (Britain); 32 per cent and 11 per cent (Japan); 46 per cent and 28 per cent (France); with 26 per cent and 12 per cent in Brazil. Standing in contrast were United States figures indicating 74 per cent male and 51 per cent female support.⁹⁷

Opinion surveys of reliability have not been conducted within targeted states although what is anecdotal cannot go ignored. Enough is known to indicate insurgent leaderships exploit drone strikes casualties to reinforce beliefs among followers that Western conduct is one of implacable hostility.⁹⁸ These attitudes obstruct but need not prevent eventual conflict settlement negotiations.

Moving from audiences to practitioners, a consistent ethics of professional conduct is needed. At stake are standards of judgement accorded *ad bellum* criteria regarding resort to a use of force. To the extent that it is militarily effective, drone use remains a tenable, casualty reducing option, short circuiting troop deployment or aerial bombing campaign demands. Yet such attractiveness, it is claimed, encourages deployments short of outright conflict, thereby

eroding *ad bellum* constraints treating force as a last resort.⁹⁹ That proviso alone does not ensure professional conduct but retains sufficient legitimacy to restrict its abuse. It is sustained through recourse to accurate, independently derived fact finding standards applicable under international human rights law. Striking the right balance is rendered problematic once covert operations are involved.

Counter claims arguing constraints do not apply in ‘combat’ locations outside a legally discernible war zone risk slippage of professional military standards. When that occurs others may follow. Observers ponder how the United States might react were China to despatch killer drones into Kazakhstan, to hunt down Uighur Muslims that it has accused of plotting terrorism.¹⁰⁰

An ethics of professional conduct is further tested by information overload. More than hindsight provides examples of the best analytical nuggets lying buried beneath a welter of informational ‘stuff’. The previously cited 2010 drone attack that killed 23 Afghan citizens saw operators miss crucial demographic data indicating the likelihood of children being amongst those targeted.¹⁰¹ Notwithstanding ever present tensions between national security needs and due oversight, a balance between these requirements is both feasible and necessary. However that is under challenge through growing concerns about the ethical permissibility of allowing machines, such as robotic systems, to autonomously determine the application of force. Relevant are warnings against about enhanced technology conferring legal or ethical legitimacy.¹⁰²

Other moral dilemmas emerge. Take for example the previously mentioned drone strike killing of Mullah Nazir, a leader who issued an edict banning polio immunisation. Were his removal to allow that programme to proceed, saving the lives of many children, what may we conclude? A military response would regard that outcome a bonus, secondary to the security objectives of weakening Al Qaeda’s Pakistani sanctuary. A human rights response would emphasise the necessity of capture and criminal prosecution of a presumed outlaw, as happened to Pakistani doctor Afridi now serving a 33 year prison sentence for supporting Laskar-e-Islam a Khyber-based terror group. However it is weighed in the moral balance, any justification for Nazir’s killing cannot avoid prior UN Charter requirements guiding legitimate recourse to force, host-state sovereignty in use of that force, and domestic willingness to apply the rule of law. From an ethical perspective, those rules alone do not

represent adequate standards but, with evolving norms designed to curb the arbitrary use of force, they help inform appropriate restrictions over drone use.

Scope for Controls?

Conditions permitting an institutionalisation of norms and rules constraining the proliferation of drone technology are not auspicious. Yet this is a necessity that requires consideration, in the first instance through an informed international policy debate about needed modalities. Should proliferation by sale and transfer continue unabated, as is probable, then reductions of military advantage following development of retaliatory technologies, including lasers, will not be far behind. That will compound doubts about lack of defensive capability, vulnerability to disruption, limited manoeuvrability, as well as rising costs once shortened vehicle life is accounted for.

While uneven, a growth of mutual vulnerability to military drone strikes can strengthen arms control incentives and value of agreements grounded in reciprocity. A potential incentive exists with shared concerns over further development of low-flying, limited signature ‘suicide’ drones able to penetrate Patriot air defence systems – a form of poor man’s cruise missile.¹⁰³

Even within uncontested airspace, drone resilience has proven suspect, a growing incidence of crashes now occurring.¹⁰⁴ This has occurred, for example, on the runway at Djibouti airport, near Camp Lemonnier, a now substantial US military base devoted to counter-terrorism. In early 2013, the United Kingdom Ministry of Defense reported that, for the preceding five years, it had lost 447 of its military drones in Afghanistan and Iraq. This was due to technical faults, controller error, or undesirability of retrieval from hostile locations.¹⁰⁵ Most were small, hand-held Desert Hawk Type 3 systems used by the army. Despite these losses, the UK Ministry of Defence has insisted Desert Hawk deployments provide indispensable and flexible intelligence for ground forces operating in difficult terrain. Critics observe that this rate of loss does not allay concerns about opening up civilian airspace to unmanned drones.¹⁰⁶ Those worries include lack of UAV software certification.

The information superiority promised by UAV systems is only as good as the analytical and inter-agency infrastructure established to handle its burgeoning profusion.¹⁰⁷ Obtaining local intelligence of sufficient reliability for strike accuracy is a necessity acknowledged, but

eroded by enhanced deployment and the convenience of remotely controlled operational and targeting capacities. This is compounded by signature and so-called ‘double tap’ strikes, where a target is attacked again to kill first responders who may have gathered for rescue or funeral purposes, hardly activities comprising direct participation in hostilities.¹⁰⁸ A moratorium on strikes conducted by such means deserves favourable consideration.

In regard to proliferation, the scale of current global UAV production outstrips national and international controls. Standards of national control over exports of military or dual-use UAV technology, equipment, and support systems is at times opaque and of variable effectiveness. International control measures operate by consensus, are voluntary, and capable of exception. This is evident with both the Missile Technology Control Regime (MTCR) and the Wassenaar Agreement now briefly considered.

Currently the MTCR operates a categorisation dividing longer range, heavier payload weapons delivery systems from those of lighter, more restricted range. For the first category there is a strong ‘presumption of denial’ – an assumption that MTCR members will not export such systems, wider discretion allowed the second category. UAV export interests have lobbied MTCR members to have the heavier systems included under the second, more permissive MTCR category. And leading American UAV manufacturers have redesigned existing platforms accordingly. This is designed to boost sales, such as those for the unarmed Predator XP into already competitive Asian, Latin American and Middle Eastern markets.¹⁰⁹

A problem identified over a decade ago persists and comprising MTCR equipment, software and technology provisions that lag behind the quickening tempo of commercially available flight and support management systems.¹¹⁰ These are capable of redeployment from manned aircraft into UAVs. While the United States promotes the MTCR, its domestic agencies encounter difficulties over domestic information sharing and end-use monitoring of drone exports.¹¹¹ Were improved controls on such systems implemented through the MTCR, they would apply to foreign exports alone, not their national acquisition. Of the 40 nations indigenously producing UAVs today, only 22 are members of the MTCR, though some such as Israel and Slovakia voluntarily adhere to its guidelines.

Under the Wassenaar agreement, key arms exporting states, including the United States, Russia, South Africa and most EU states regularly exchange information over deliveries in

eight conventional weapons categories, one including drones (category four, military aircraft and UAVs). The primary purpose is to enhance and retain transparency in national export control regimes, including deliveries to those outside the arrangement. Under surveillance are some, but not all dual use items commonly used in drones. The Agreement is voluntary and lacks powers of legal enforcement; as of 2012 it comprised 41 member countries, absentees including China and Israel, although since 2005 the latter has voluntarily adhered to the agreement's quasi regulatory, confidence building functions.

Incentives for tighter civilian UAV controls should strengthen given the near certainty that, within the coming decade, accidents and collisions will occur - whether through remote pilot error, mechanical breakdown, software malfunctions in the 'brains' of the aircraft, or failed coordination with civilian-air traffic controllers. This could result in stronger rules and enforcement measures for civil systems, military applications left virtually unrestrained. However moratoriums could be agreed for application during ceasefires intended to facilitate negotiated conflict settlements. One option may lie in an international convention for the sale and use of drones, possibly emulating what exists with the existing Convention on Certain Conventional Weapons and its provisions on incendiary devices and fragment-based weapons.¹¹²

Drone strikes add to concerns about civilian casualties resulting from the use of high explosive and fragmentation weapons detonated within concentrated habitations.¹¹³ Tragically illustrated by the Syrian war since 2011, and used in compacted urban environments, this weaponry has seriously compromised application of IHL rules of proportionality and distinction. No immediate prohibition in prospect, the employment of such weaponry in concentrated settlements tests the conscience and self-respect of states pledged to uphold and promote humanitarian law essentials. This could build upon concerns that autonomous systems, unable to perform functions of distinction, and employing indiscriminate and disproportionate use of force, smudge legal responsibility for war crimes.

As technology develops to further distance attackers from targets, pressure will grow for workable international rules of restraint. That will necessitate anticipation of what is required to restrict the proliferation of such weaponry.¹¹⁴ Military lawyers concerned about armed robots operating autonomously, see removal of a distinct man 'in the loop', to whom accountability is reliably identified, opening a serious space of legal and ethical

complexity.¹¹⁵ Some professional military want an unambiguous retention of man ‘in the loop’ prescriptions; others are keen to maximise the operational advantages flowing from this rapidly developing technology now invigorated by generously funded research.

In response, the U.S. Department of Defence Directive on Autonomy in Weapon Systems of November 2012 attempted to square this circle. Although not ruling out the development and deployment of fully autonomous lethal weapons engaging human targets, ‘Persons who authorize the use of, direct the use of, or operate autonomous and semi-autonomous weapon systems must do so with appropriate care and in accordance with the law of war, applicable treaties, weapon system safety rules, and applicable rules of engagement.’¹¹⁶ This does not answer the question whether the perceived military advantages of increasingly sophisticated UAV technologies, stand to outweigh support for negotiated agreements designed to curb the potentially untrammelled proliferation of such weaponry.¹¹⁷

Whether by treaty or other means, this is weaponry that cannot now be ‘uninvented’. Could so-called ‘soft law’ restraints operate to effect, rendering internationally disreputable indiscriminate uses of this weaponry? A collation and international dissemination of the IHL rules, unambiguously identifying the conditions under which a use of this weaponry is proscribed, could warrant consideration. That is a project where civil society interests and governments could collaborate to effect within democratic states such as New Zealand.

Conclusions

Controversy surrounding the continued expansion of drone technology and its military applications will not abate. It cannot avoid immersion within a clash between an increasingly sophisticated form of military technology and an ever elusive adversary. The purposes of the former are needs-based, finite and instrumental; the constituency of the latter diverse, unpredictable and largely disconnected from the fates of those targeted. Caught in the crosshairs is the future of counter-insurgency strategies, conceived during the Cold War but struggling to combat terrorism.

As current target areas undergo prolonged phases of political turmoil and possible territorial realignment, the utility of covert drone strikes upon insurgent leaderships faces steady decline. It will come through recognition that the undoubted weakening of Al Qaeda and Taliban leaderships has come at the price of inflamed anti-western hostility, weakened

authority of target state governments, and renewed recruitment to militant networks. These conditions have given license to internal and cross-border criminality and violence, as well as worsening sectarian conflict across the Middle East, South West Asia and North and Central Africa. These outcomes were no more than marginally envisaged when drone weaponisation began in 2004.

Drone surveillance and intelligence gathering functions will expand, some of them sea-based, others primarily designed for domestic security purposes. Without adequate legal or confidence building restraints and supports, these non-weaponised systems will generate security and political difficulties within and between states. Militarised drones will gradually find their level as war fighting tools suitable for some missions but not others. A realisation already current will grow: namely, the weaponry itself is less the problem, than the policy assumptions guiding its use with their combustible social and communal consequences. Here covert operations could be judged more trouble than they are worth.

Pressures to place military use under stricter controls are intensifying. They will include calls for transparency of legal justification, an end to covert, unaccountable use, and more rigorous application of humanitarian law principles of distinction and proportionality. Unavoidable is the dilemma of continued military use weakening overall strategic purpose. Still pertinent remains Donald Rumsfeld's frequently cited question of October 16 2003, namely that 'today we lack metrics to know if we are winning or losing the global war on terror. Are we capturing, killing or deterring and dissuading more terrorists every day than the madrassas and the radical clerics are recruiting, training and deploying against us?'¹¹⁸

Justified military claims that drone technology comprises a major step change offering reduced casualties, enhanced control of the battlefield, and greater operational flexibility cannot be taken at face value in isolation. Such advantages are marginalised when accompanied by strategic incoherence and failure to grapple with underlying causes of grievance including poverty, unemployment and incompetent governance. Driving recruitment to insurgency will be less fundamentalist zeal than hopes of less bad alternatives providing some hope of essential community protection.

Although disputed, the tally of civilian casualties sustained by drone strikes cannot be explained away as regrettable but necessary collateral damage. Open-ended 'signature' and

‘double tap’ strikes against loosely categorised ‘militants’ constitute a palpable violation of humanitarian law. By the same token, those defending these policies can justifiably assert that civilian drone casualties, numbering in thousands, are vastly outnumbered by the hundreds of thousands of lives lost annually through the illicit and unregulated flow of small arms and light weapons. Unlike drone strikes most of that killing goes unreported, illicit arms trading interests preferring it remain that way. Either way, the case for rule bound conduct across all forms of weaponry just identified remains compelling.

Governments will note the findings of an inquiry conducted by the UN Special Rapporteur on Human Rights and Counter-Terrorism, launched in January 2013 and scheduled for publication later that year. This was into the civilian impact of drones and other forms of targeted killing. Its focus included applicable legal frameworks, factual evidence regarding civilian casualties, and recommendations to the UN General Assembly about the duty of States to conduct effective, independent, and impartial investigations into the lawfulness and proportionality of attacks conducted by such means.

That report will comprise part of a lengthy process stretching into the years ahead. Such a process will have to grapple with how best to reconcile the uses of this particular technological innovation within existing, but as yet undetermined rules and restraints. The incentives provided by reciprocated restraint will gain appeal but so will the perceived advantages of national acquisition, sale, and military use of drone technologies. A balancing of these demands is required, but that will not occur without a greater commitment by major powers to multilateral processes of rule formation, legal compliance, and disarmament and arms control.

End Notes

¹ Hence claims that public examination is deficient by not explaining how covert weapons use is meant to coexist with the aims and objectives of statecraft, See David Ignatius, 'An embassy asks, drones or diplomacy?' *The Washington Post*, 21 June 2012.

² Gregory Johnsen, 'Losing Yemen', *Foreign Policy*, November 5 2012, p. 1.

³ U.S. Government Accounting Office (GAO), *Non-proliferation. Agencies could Improve Information Sharing and End-Use Monitoring on Unmanned Aerial Vehicle Exports*, GAO-12-536, July 2012, p.9.

⁴ 'Teal Group Predicts UAV Market', *PR Newswire*, Washington 11 April 2012.

⁵ United States Air Force Unmanned Aircraft Systems Flight Plan 2009-47, Headquarters USAF, 18 May 2009. This research previously included possible nuclear propulsion, a Sandia laboratory investigation now in abeyance.

⁶ Comments of Douglas Barrie cited by Reuters Staff, 'No Longer Just a U.S. Toy, UAVs Go Global', *Aviation Week and Space Technology*, 7 December 2012.

⁷ U.S. GAO 12-536, op.cit, p. 14.

⁸ Between June 2004 and September 2012, according to research by the London-based Bureau of Investigative Journalism, drone strikes killed between an estimated 2,562 and 3,325 people in Pakistan, 474 to 881 being civilians including 176 children. These figures were disputed by senior US officials. The variability of these estimates is partly explained in a region such as Waziristan (northwest Pakistan and adjoining Afghanistan), by its frequent inaccessibility to outsiders for purposes of independent verification, as well as the opacity of CIA targeting criteria for hostile selection.

⁹ This includes the June 2011 claim of John Brennan that, over the previous year, 'there hasn't been a single collateral death because of the exceptional proficiency, precision of the capabilities that we've been able to develop.' Ken Dilanian, 'U.S. Counter-terrorism Strategy to rely on Surgical Strikes, Unmanned Drones', *Los Angeles Times*, 29 June 2011. In 2012, the UK Ministry of Defence claimed that only four civilians had been killed by its drone strikes in Afghanistan, this figure based on Afghans lodging official complaints to this effect at military bases. Nick Hopkins, 'British reliance on drones in Afghanistan prompts fears for civilians', *The Guardian*, 18 June 2012. For comparison, see UN data for Afghan civilian casualties, cited infra note 30.

¹⁰ As a 2011 British Ministry of Defence study inquired: 'If we remove the risk of loss from the decision-makers' calculations when considering crisis management options, do we make the use of armed force more attractive? Will decision-makers resort to war as a policy options far sooner than previously?' UK Ministry of Defence, Joint Doctrine Note 2/11, The UK Approach to Unmanned Aircraft Systems, 2011, section 517.

¹¹ For relevant discussion, see Tom Villaseñor, 'What is a Drone Anyway?', *Scientific American*, 14 April 2012; Paul Marks, 'Civilian drones to fill the skies after law shake-up', *New Scientist*, 6 February 2012; Jamie Doward, 'Rise of drones in UK airspace prompts civil liberties warning', *The Observer*, 7 October 2012.

¹² Jenna Jordan, 'When heads Roll: Assessing the Effectiveness of Leadership Decapitation', *Security Studies*, 18, 2009, pp. 753-54.

¹³ Patrick B. Johnston, 'Does Decapitation Work?' *International Security*, 36, 4, 2012, p.77.

¹⁴ Daniel L. Byman, 'The Targeted Killings Debate', Council on Foreign Relations, June 8 2011, p.4, at: (www.cfr.org/international-peace-and-security/targeted-killings-debate/p25230).

¹⁵ Kate Clark, *Ibid.*, p.5.

¹⁶ For example Admiral Mike Mullen, outgoing chairman of the U.S. Joint Chiefs of Staff claimed during a September 2011 hearing before the U.S. Senate Armed Services Committee that the Haqqani network acts as a 'veritable arm of the ISI', The ISI reportedly allowed Haqqani fighters to flee U.S. drone attacks in North Waziristan to relocate in the proximate Kurram region. Aqil Shah, 'Getting the Military Out of Pakistani Politics', *Foreign Affairs*, 90, 3, 2011, p.74.

¹⁷ *The Long War Journal*, 'Senior al Qaeda and Taliban leaders killed in airstrikes Pakistan, 2004-213', at: (www.longwarjournal.org.pakistan-strikes-hvts.php).

¹⁸ Bill Roggio, 'US drone strike kills AQAP commander, 2 fighters in Central Yemen', *The Long War Journal*, January 3 2013, at: (www.longwarjournal.org.archives/2013/01/us_drone_strike_kill_19php).

¹⁹ For details, see Zia Ur Rehman, 'The Khurasan Mujahideen Seek to Eliminate Espionage in Waziristan', *Terrorism Monitor*, 9, 13, 2011.

²⁰ C. Christine Fair, 'Pakistan's Security-Governance Challenge', *Current History*, 110, April 2011, p. 136.

²¹ In 2008, Pakistani Prime Minister Gilani resisted recommendations of Interior Minister Malik for a temporary restraint of US drone Predator attacks, reputedly claiming: 'I don't care if they do as long as they get the right people. We'll protest in the National Assembly and then ignore it'. Wikileaks: 'Gilani Open to Drone Strikes on the "Right People"', *The Express Tribune*, 1 December 2010. More recently, former President Musharraf admitted giving the CIA permission to launch drone attacks. *The Guardian Weekly*, 19 April 2013, p.10.

²² Hussain Nadim, 'How Drones Changed the Game in Pakistan', *The National Interest*, 3 August, 2012.

²³ Bill Roggio, 'US drone strike kills 9 AQAP fighters in Yemen', *The Long War Journal*, 13 June 2012.

²⁴ Such close engagement was exemplified by the Obama Administration's executive order of May 2012, authorising the US Treasury to freeze the US-based assets of anyone obstructing Yemen's transition plan designed to establish constitutional rule and economic recovery. Karen DeYoung, 'President Obama executive order gives Treasury authority to freeze Yemeni assets in U.S.', *The Washington Post*, 16 May 2012.

²⁵ The letter called for 'a broader approach that places emphasis on the underlying economic and political problems (that) will better serve the stability of Yemen and, accordingly, U.S. national security interests, rather than a primary focus on counterterrorism efforts and direct military involvement'. Cited in 'Middle East experts urge changes to Obama's Yemen Policies', *Foreign Policy Magazine*, 27 June 2012.

²⁶ See for example Christopher Swift, 'The Drone Blowback Fallacy', *Foreign Affairs*, 1 July 2012; (www.foreignaffairs.com/articles/137760/christopher-swift/the-drone-blowback-fallacy).

²⁷ Cited by David Rohde, 'The Obama Doctrine: How Obama's drone war is backfiring', *Foreign Policy*, March/April 2012, p.4.

²⁸ Human Rights Watch, *Precisely Wrong. Gaza Civilians killed by Israel Drone-Strike Missiles*, New York: Human Rights Watch, 2009. This detailed 29 civilian deaths from drone strikes during Operation Cast Lead into the Gaza Strip during late 2008 and early 2009.

²⁹ Statistics released by the U.S. Air Force showed 333 drone strikes in 2012, 294 in the previous year, and 278 in 2010.

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- ³⁰ UN Assistance Mission in Afghanistan, *Afghanistan. Annual Report 2012. Protection of Civilians in Armed Conflict*, Kabul, February 2013, p. 34. In March 2013, the US Air Force ceased disclosing information and statistics about its drone strike operations in Afghanistan
- ³¹ *Ibid.*, p.1.
- ³² The subsequent inquiry identified a lack of timely reporting, poor functioning of command posts, failure to verify that vehicles targeted were not a hostile threat, and 'inaccurate and unprofessional reporting of the Predator crew operating out of Creech AFB Nevada' Headquarters U.S. Forces-Afghanistan, APO AE 09356, Memo for Commander US Forces-Afghanistan/ISAF, 13 April 2010.
- ³³ David Kilcullen and Andrew Exum, 'Death from Above, Outrage Down Below', *The New York Times*, 16 May 2009.
- ³⁴ This claim has been advanced over Afghanistan. See Hugh White, 'Afghanistan mission a total failure', *The Age*, Melbourne, 5 February 2013.
- ³⁵ Cited by Jumama Al Tamimi, 'The Resurgence of Al Qaida', *Gulf News*, April 16 2013.
- ³⁶ Emile Simpson, *War from the Ground Up: Twenty-First-Century Combat as Politics*, Hurst, US Columbia Press, 2012.
- ³⁷ 'China to use drones on islands in dispute with Japan', The Associated Press, 24 September 2012. See also Jonathan Kaiman and Justin McCurry, 'Japan and China step up drone race as tension builds over disputed islands', *The Guardian*, 9 January 2013.
- ³⁸ See for example Mary Ellen O'Connell, 'The Choice of Law Against Terrorism', *Journal of National Security and Policy*, 4, 343, 2010; P. W. Singer, 'The Ethics of Killer Applications: Why Is It So Hard To talk About Morality When it Comes to New Military Technology?', *Journal of Military Ethics*, 9, 4, 2010, pp. 299-312; Philip Alston, 'The CIA and Targeted Killing Beyond Borders', *Harvard National Security Journal*, 2, 2011, pp. 283-446; Gabriella Blum and Philip Heymann, 'Law and Policy of Targeted Killing', *Harvard National Security Journal*, 1, 2010, pp.145-170; Bradley Jay Strawser, 'Moral Predators: The Duty to Employ Uninhabited Aerial Vehicles', *Journal of Military Ethics*, 9, 4, 2010, pp. 342-368.
- ³⁹ See for example Jo Becker and Scott Shane, 'Secret "Kill List" Proves a Test of Obama's Principles and Will', *The New York Times*, 29 May 2012, p. A1.; Scott Shane, 'U.S. Attacks, Online and From the Air, Fuel Secrecy Debate', *The New York Times*, 7 June 2012, p. A1.
- ⁴⁰ Christopher Swift, 'The Drone Blowback Fallacy', op.cit.
- ⁴¹ 'Attempted NY Bombing is reaction to drone strikes: Qureshi', *The Nation*, Karachi, 5 May 2010, p.1.
- ⁴² Cited by W. J. Hennigan, 'Drone makers urge US to let them sell more overseas', *Los Angeles Times*, July 1 2012.
- ⁴³ Speech of John Brennan at the Woodrow Wilson Centre, Washington DC, 30 April 2012, at Council on Foreign Relations, (www.cfr.org/counterterrorism/brennans-speech-counterterrorism-april-2012/p28100).
- ⁴⁴ *The Frontier Post*, Pakistan, 11 July 2012.
- ⁴⁵ Nathalie Van Raemdonck, 'Vested Interest or Moral Indecisiveness? The EU's Silence on the US Targeted Killing Policy in Pakistan', *Istituto Affari Internazionali*, 12 April 2012, p. 8.
- ⁴⁶ In an important May 2013 ruling, the Pakistani High Court required the government to lodge an immediate and genuine complaint to the UN and to 'make a request to the UN Secretary General to constitute an independent war crime tribunal, to direct the US authorities to immediately stop drone strikes ... and to immediately arrange for the complete and full compensation for the victims' families'. Clive Stafford Smith, 'Will Pakistan finally stand up against illegal drone attacks?' *The Guardian*, 12 May 2013.
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⁴⁷ Peter Bergen and Katherine Tiedemann, 'Washington's Phantom War. The Effects of the U.S. drone programme in Pakistan', *Foreign Affairs*, 90, 4, 2011, p. 18.

⁴⁸ Speech of John Brennan at the Woodrow Wilson Centre, Washington DC, 30 April 2012, p. 7.

⁴⁹ Paul Rogers sees that extending to Mali, including risks of that conflict evolving into a 'long lasting guerrilla conflict ... the agenda set by the core elements of remote control war: armed drones, targeted assassination, special forces, privatised military and repeated air strikes.' Paul Rogers, 'Mali and the al-Qaida trap', *Open Democracy*, 25 January 2013, at ([www.opendemocracy.net/author/Paul Rogers](http://www.opendemocracy.net/author/Paul%20Rogers)).

⁵⁰ Dennis Blair comments cited in 'Secret "Kill List" Proves a Test of Obama's Principles and Will', *New York Times*, 29 May 2012. The comments of former CIA Director Panetta were to the Pacific Council on International Policy, 18 May 2009, CNN 'US airstrikes called "very effective"', 18 May 2009.

⁵¹ Rand Research Brief, *How Terrorist Groups End*, California: Santa Monica, 2008.

⁵² In a letter to the British Ambassador, US Secretary of State Webster argued, following the Niagara Falls destruction of the vessel *Caroline*, that a self-defence claimant would have to show that 'the necessity of self-defence was instant, overwhelming, leaving no choice of means, and no moment of deliberation ... and that the British force, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.'

⁵³ Relevant is the International Court of Justice ruling in its Nuclear Weapons advisory opinion of 1996, stating inter alia, 'whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, (of Civil and Political Rights) can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.' ICJ Reports 1996, 226, § 25.

⁵⁴ Richard Murphy and John Radsan, 'Due Process and Targeted Killing of Terrorists', *Cardozo Law Review*, 31, 2, 2009, p.408.

⁵⁵ Michael Schmitt, 'Drone Attacks under the Jus ad Bellum and Jus in Bello: Clearing "The Fog of Law"', *Yearbook of Humanitarian Law*, 13, 2010, pp. 311-26.

⁵⁶ Emanuela-Chiara Gillard, 'International Humanitarian Law and Extraterritorial State Conduct', in Fons Cooman and Menno T. Kamminga (eds), *Extraterritorial Application of Human Rights*, Antwerp-Oxford: Intersentia, 2004, p.39.

⁵⁷ Daniel Bethlehem, 'International Law and the Use of Force: The Law as it is and as it should be', (written evidence to the British Parliament Select Committee on Foreign Affairs), 8 June 2004, at: (www.publications.parliament.uk/pa/cm200304/cmfa/441/4060808).

⁵⁸ Article 51 requires member states to immediately report any such measures to the Security Council. Neither Israel nor the United States have done so when invoking Article 51 in justification of actions involving military drone strikes.

⁵⁹ Prosecutor v. Dusko Tadić aka Dule, ICTY, No. IT-94-1-AR72, para 102, 2 October 1995, (Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction).

⁶⁰ As per comment, 'All reporting of government accounts of "militant" deaths should include acknowledgment that the US government counts all adult males killed by strikes as "militants," absent exonerating evidence.' *Living Under Drones: Death, Injury, and Trauma to Civilians from US Drone Practices in Pakistan*, International Human Rights and Conflict Resolution at Stanford Law School and Global Justice Clinic at NYU School of Law, 2012, p.2. At: (http://civiliansinconflict.org/uploads/files/publications/The_Civilian_Impact_of_Drones_w_cover.pdf).

⁶¹ The Public Committee against Torture in *Israel et al v. The Government of Israel et al*, Supreme Court of Israel sitting as the High Court of Justice, 11 December 2006, para 40.

⁶² Human Rights Watch, *Precisely Wrong: Gaza Civilians Killed by Israeli Drone-Strike Missiles*, June 2009, at: (www.hrw.org).

⁶³ Report: Israel used unmanned drones to attack Sudan convoys', *Haaretz Service and New Agencies*, 29 March 2009.

⁶⁴ Isabel Kershner, 'Israel's Military Says Actions in Gaza War Did Not Violate International Law', *The New York Times*, 22 April 2009, at: (www.nytimes.com/2009/04/23/world/middleeast/23gaza.html?ref=middleeast).

⁶⁵ Some American allies, including Germany, have wanted retention of clear distinction dividing what is 'hot' from what is not when determining battlefields limits in Afghanistan, the former bound by IHL, the latter by IHRL. Their concerns over state responsibility and individual criminal liability for arbitrary deprivation of life under human rights law have been tangible.

⁶⁶ Brennan Address, Woodrow Wilson Center for International Scholars, Washington DC, 30 April 2012.

⁶⁷ Article 6 (right to life); Article 7 (outlawing cruel, inhumane and degrading treatment or punishment); Article 9.1 (right to liberty and security); Article 17 (right to freedom from arbitrary or unlawful interference with privacy, family and home); Article 21 (right to peaceful assembly); Article 22 (right to freedom of association).

⁶⁸ United States Department of Justice, Address of Attorney General Holder, Northwestern University School of Law, March 5, 2012.

⁶⁹ US Department of Justice White Paper: Lawfulness of a Lethal Operation Directed against a U.S. Citizen who is Senior Leader of Al-Qa'ida or an Associated Force. Unsigned and undated but released as authentic by NBC News, 4 February 2013. This leaked document contained few surprises. Killing of US citizens abroad was justified on grounds of their Al-Qaeda affiliations, on the non-feasibility of capture, on the consent of a host nation or its unwillingness or inability to suppress the threat posed by the individual targeted. 'Imminent threat' was construed expansively to not require actual evidence of a planned attack. Unsurprising yet still remarkable for a Justice Department memo was the claim that the courts should not play a role in controlling, or even reviewing such decisions.

⁷⁰ Of note is missile expert Dennis Gormley's comment, 'the copycatting is what I worry most about.' Cited by Scott Shane, 'Coming Soon: The Drone Arms Race', *The New York Times* (Sunday Review), 9 October 2011, p. SR 5.

⁷¹ Ben Saul, 'The Emerging International Law on Terrorism', in Ben Saul (ed), *Terrorism. Documents in International Law*, Oxford and Portland: Hart Publishing, 2012, p. lxxxv. On model laws, see United Nations Office on Drugs and Crime (UNODC), *Handbook on Criminal Justice. Responses to Terrorism*, UN: New York, 2009; Financial Action Task Force (FATF), International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation. *The FATF Recommendations*, FATF/OECD, Paris, 2012; Commonwealth Secretariat, Model Legislative Provisions on Measures to Combat Terrorism, Commonwealth Secretariat, London, 2002.

⁷² The dedicated investigation unit in Geneva was established under special procedures of the UN Human Rights Council and convened by special rapporteurs Ben Emmerson and Christof Heyns.

⁷³ Cheri Kramer, 'The Legality of Targeted Drone Attacks as U.S. Policy', *Santa Clara Journal of International Law*, 339, 2011, p. 357. The relevant Rome Statute Article referred to is 8(2) (e) (i) which criminalises the intentional attack on civilians not categorised as directly participating in hostilities.

⁷⁴ Address of Dr Philip Spoerri, ICRC Director for International Law and Cooperation, to San Remo Roundtable, 8-10 September 2011. At: (www.icrc.org/eng/resources/documents/statement/new-weapon-technologies-statement-2011-09-13.htm).

⁷⁵ This permitted the President 'to use all necessary and appropriate means of force against those nations, organisations, or persons he determined planned, authorised, committed or aide the terrorist attacks that occurred on September 11 2001, or harboured such organisations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organisations or persons.'

⁷⁶ Speech of Jey Johnson, 'National security law, lawyers and lawyering in the Obama Administration', delivered Yale Law School February 22, 2012. At: (www.cfr.org/national-security-and-defense/jeh-johnson's-speech-national-security).

⁷⁷ *Living Under Drones: Death, Injury, and Trauma to Civilians from US Drone Practices in Pakistan*, 2012, op. cit., p. 77.

⁷⁸ 'Global War on Terror Given New Name', *The Washington Post*, 25 March 2009, p. A04.

⁷⁹ Cited by Jane Mayer, 'The Predator War: What are the risks of the CIA's covert Drone Program?' *The New Yorker*, 26 October, 2009.

⁸⁰ Charlie Savage and Mark Landler, 'White House defends Continuing US role in Libya', *New York Times*, 15 June 2011.

⁸¹ Charlie Savage, '2 top lawyers lost to Obama in Libya War Policy Debate', *New York Times*, 17 June 2011.

⁸² Philip Alston, 'The CIA and Targeted Killings Beyond Borders', *Harvard National Security Journal*, 2, 2, 2011, pp.283-445.

⁸³ Peter Bergen and Katherine Tiedemann, 'Washington's Phantom War. The Effects of the U.S. Drone Program in Pakistan', *Foreign Affairs*, 90, 4, 2011, p.18.

⁸⁴ 'The responsibility to properly record casualties is a requirement jointly held by those who launch and control the drones and those who authorise or agree their use.' Susan Breau and Marie Aronnson, *Drone Attacks, International Law and the recording of Civilian Casualties of Armed Conflict*, Oxford Research Group Discussion Paper 2011, p. 32.

⁸⁵ Civilians in Armed Conflict. Harm and Conflict in Northwest Pakistan. Campaign for Innocent Victims in Conflict (CIVIC), Washington DC, 2010. At www.civeworldwide.org/Pakistan_Report_2010).

⁸⁶ Ibid.

⁸⁷ Heba Aly, 'Analysis: The view from the ground: How drone strikes hamper aid', *Humanitarian News and analysis*, 20 March 2013, at: (www.irinnews.org/report/97690/Analysis-the-view-from-the-ground).

⁸⁸ Alfred Cumming, Congressional Research Service, Sensitive Covert Action Notifications: Oversight Options for Congress, 6 April, 2011, 1-8.

⁸⁹ See for example Adam Entous, Siobhan Gorman and Julian Barnes, 'US Tightens Drone Rules', *Wall Street Journal*, 4 November 2011. In early 2013 finalisation of a drone warfare manual remained delayed by infighting between the CIA, seeking greater latitude to conduct drone strikes, and other agencies. Granting the CIA temporary exemption of between one and two years to continue its controversial 'signature' strikes was seen as the compromise allowing the draft to proceed. Greg Miller, Ellen Nakashima and Karen DeYoung, 'CIA drone strikes will pass in counterterrorism "playbook" officials say', *The Washington Post*, 20 January 2013.

⁹⁰ Afsheen John Radsan and Richard Murphy, 'The Evolution of Law and Policy for CIA Targeted Killing', *Journal of National Security and Law*, 5, 2012, p.416.

⁹¹ Philip Alston, 2011, op cit, p. 285.

⁹² US District Court, Southern District of New York, US Department of Justice/American Civil Liberties Union/New York Times, ruling 2 January, 2013, p.3.

⁹³ HCJ 769/02, *Public Committee Against Torture in Israel. v. Government of Israel*, 11 December 2005.

⁹⁴ Cited by David Wood, 'Armed Drone Debate Should Focus on Killing, not the Weapons, Military Experts Suggest', *Huffington Post*, Politics, 11 February 2013.

⁹⁵ Further extending that ambivalence, two observers see the same distinctly democratic set of interests and norms conventionally considered, pivotal for democratic peacefulness yielding both peaceful and belligerent behaviour. Frank Sauer and Niklas Schörnig, 'Killer drones: The "silver bullet" of democratic warfare?' *Security Dialogue*, 43, 4, 2012, 363-80.

⁹⁶ Pew Research Centre. Global Attitudes Project, 13 June, 2012, Overview, p.2.

⁹⁷ Ibid, Question 59b.

⁹⁸ See for example *Civilians in Armed Conflict*, op. cit.

⁹⁹ Daniel Brunstetter and Megan Braun, 'The Implications of Drones on the Just War Tradition', *Ethics and International Affairs*, 25, 3, 2011, p. 338.

¹⁰⁰ Scott Shane, 'Coming Soon: The Drones Arms Race', *New York Times Sunday Review*, The Opinion Pages, 8 October 2011.

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¹⁰³ J. Michael Cole, 'Coming to a Warzone Near You: Kamikaze Drones', *The Diplomat*, 15 October 2012, p. 2.

¹⁰⁴ David Zucchino, 'War Zone Drone Crashes Add Up', *Los Angeles Times*, 6 July 2010.

¹⁰⁵ *The Guardian*, 12 February 2013.

¹⁰⁶ Ibid, cited comments of Chris Cole representing Drone Wars UK.

¹⁰⁷ That will prove a key requirement for NATO's planned Alliance Ground Surveillance programme involving the purchase and operation of UAV systems equipped with advanced ground surveillance radar sensors, and scheduled for inception in 2017.

¹⁰⁸ 'Residents of areas in which drones operate do not know what kind of conduct or relationships could put them at risk. Offering indirect support to militants such as food or quarter or political or ideological support would not formally qualify under international norms as "direct participation in hostilities"'. Christopher Rogers, *Civilians in Armed Conflict: Civilian Harm and Conflict in Northwest Pakistan*, Campaign for Innocent Victims in Conflict (CIVIC), 2010, p. 22

¹⁰⁹ Eddie Walsh, 'Predator Maker Redesigns UAV to Boost Exports', *AOL Defense*, 15 November 2011. A key supplier, General Atomics, seeks Predator XP sales in Australia, South Korea and India. Since the November 2008 Mumbai terror attacks, military commanders in India have pressed for the acquisition of UAV military strike capabilities.

¹¹⁰ Testimony of Dennis M. Gormley before the Subcommittee on International Security, Proliferation and Federal Services of the U.S. Senate Committee on Governmental Affairs, 12 February 2002. At: (http://hsgac.amend.senate.gov/old_site/021202gormley.htm).

¹¹¹ This was a core message of the relevant GAO report, GAO op cit, 12-536.

¹¹² Michael J. Boyle, 'The costs and consequences of drone warfare', *International Affairs*, 89, 1, 2013, p. 28.

¹¹³ For fuller discussion, see John Borrie and Maya Brehm, 'Enhancing civilian protection from use of explosive weapons in populated areas: building a policy and research agenda', *International Review of the Red Cross*, 93, 883, 2011, pp. 1-28.

¹¹⁴ Peter Singer, 'Military Robots and the Laws of War', *New Atlantis*, Brookings, Winter, 2009, p.25.

¹¹⁵ Ibid.

¹¹⁶ U.S. Department of Defense Directive 3000.09, 21 November 2012.

¹¹⁷ For suggestions on control of robotic systems, including an international monitoring body, see report of Special Rapporteur Christof Heyns on lethal autonomous robotics, UN General Assembly document A/HRC/23/47, 9 April 2013.

¹¹⁸ Donald Rumsfeld, 'Global War on Terror', *USA Today*, 16 October 2003.